

# The Chair, the Needle, and the Damage Done: What the Electric Chair and the Rebirth of the Method-of-Execution Challenge Could Mean for the Future of the Eighth Amendment

Timothy S. Kearns

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# THE CHAIR, THE NEEDLE, AND THE DAMAGE DONE: WHAT THE ELECTRIC CHAIR AND THE REBIRTH OF THE METHOD-OF-EXECUTION CHALLENGE COULD MEAN FOR THE FUTURE OF THE EIGHTH AMENDMENT

*Timothy S. Kearns*<sup>†</sup>

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## INTRODUCTION

It was shortly before 9 a.m. Jose Sandoval, Jorge Galindo, and Erick Vela went in shooting as they entered the Norfolk, Nebraska branch of U.S. Bank. In forty seconds, five people—four bank tellers and a customer—had been shot in the head and killed.<sup>1</sup> “It went to hell in the bank,” one of the bank robbers later said.<sup>2</sup> The state declared a state of emergency and used roadblocks and a Black Hawk helicopter to appre-

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<sup>†</sup> J.D. expected 2006, Cornell Law School; B.A. 2003, Iowa State University. The author would like to thank James Freda for his valuable comments.

<sup>1</sup> *4th Man Nabbed in Deadly Bank Heist*, CBS NEWS (2002), <http://www.cbsnews.com/stories/2002/09/27/national/main523559.shtml> [hereinafter *Heist*].

<sup>2</sup> *Bank Robbery Suspect: “It went to hell.”* CNN.COM (2002), <http://archives.cnn.com/2002/US/Central/09/27/bank.slayings>.

hend the robbers and their getaway driver.<sup>3</sup> The reaction was the same throughout the American Heartland—the town of Norfolk is simply not supposed to make national news, at least not since native son Johnny Carson left *The Tonight Show*.

This was the deadliest bank heist in a decade. Presently, it is slated to claim at least two more lives, those of Sandoval and Galindo.<sup>4</sup> While some death penalty proponents will periodically find sympathy for those facing execution, they will probably remain silent for these men, who have showed little remorse for their offenses. Nonetheless, these men are entitled to the protections of the Eighth Amendment, even if the strength of these protections is by-and-large unclear. Unlike the guilt of Galindo and Sandoval, the lawful execution of their sentence is uncertain. The uncertainty arises not because of procedural error or jury misconduct, but because of the method by which his execution must be carried out under state law<sup>5</sup>—the application of 2,450 volts of electricity<sup>6</sup> in the last electric chair which has its use mandated by state law.<sup>7</sup>

The electric chair poses questions because of those Eighth Amendment protections that constitutionally bar the infliction of cruel and unusual punishments. In assessing whether a punishment is cruel and unusual, the Supreme Court has taken a number of methods: assessing whether a sentence is grossly disproportionate to the offense,<sup>8</sup> whether a punishment is *per se* cruel and unusual,<sup>9</sup> or, in death penalty cases, whether the method of executing the death sentence is cruel and unusual.<sup>10</sup> This last category, which is termed method-of-execution analy-

<sup>3</sup> *Heist*, *supra* note 1.

<sup>4</sup> *State Briefs*, LINCOLN JOURNAL STAR, Oct. 27, 2005, at B2. Vela was also sentenced to death. His attorneys contend, however, that he is mentally retarded, so the validity of his sentence has required further adjudication that is projected to take place in January 2006. *Id.*

<sup>5</sup> NEB. REV. STAT. § 29-2532 (2004).

<sup>6</sup> See COMMITTEE ON CRIMINAL JUSTICE – FL., A MONITOR: METHODS OF EXECUTION & PROTOCOLS, IV. METHODS OF EXECUTION, available at <http://www.fcc.state.fl.us/fcc/reports/monitor/methmon.html> [hereinafter COMMITTEE].

<sup>7</sup> See, e.g., Martha Stoddard, *Judge Criticizes Death Penalty: Letter to Lawmakers Questions Justice of Its Use*, OMAHA WORLD-HERALD, March 2, 2005, at 1B; Death Penalty Info. Ctr., *Methods of Execution*, at <http://www.deathpenaltyinfo.org/article.php?scid=8&did=245>.

<sup>8</sup> See *Ewing v. California*, 538 U.S. 11, 30-31 (2003) (holding sentence of 25 years to life for “third-strike” offense of stealing golf clubs permissible); *Coker v. Georgia*, 433 U.S. 584, 592 (holding death penalty grossly disproportionate and excessive punishment for crime of rape).

<sup>9</sup> See *Furman v. Georgia*, 428 U.S. 153, 169 (1976) (“the punishment of death does not invariably violate the Constitution”); *Trop v. Dulles* 356 U.S. 86, 101 (1957) (“use of denationalization as a punishment is barred by the Eighth Amendment”).

<sup>10</sup> See *Nelson v. Campbell*, 541 U.S. 637, 643-44 (2004) (discussing classification of method-of-execution claims alleging cruelty); *Wilkerson v. Utah*, 99 U.S. 130, 136-137 (holding punishment of death by shooting to be constitutional).

sis,<sup>11</sup> has largely languished at the Supreme Court level, with no cases directly engaging in method-of-execution analysis in 115 years.

The answers to the questions of cruelty raised by the Nebraska's electric chair may well determine the scope of the Eighth Amendment and of the death penalty in the United States. Over two decades ago, the Supreme Court declined to hear *Glass v. Louisiana*<sup>12</sup> to determine the constitutionality of the electric chair and, over ten years ago, similarly avoided a method-of-execution issue as applied to hanging in *Campbell v. Wood*.<sup>13</sup> It is apparent that only a case of great prominence could lure the Court to engage in a method-of-execution analysis under the Eighth Amendment. More recently, the Supreme Court reversed course from *Penry v. Lynaugh*,<sup>14</sup> which held that a defendant's mental retardation served as a mitigating factor and not a categorical preclusion of eligibility for the death penalty,<sup>15</sup> to conclude in *Atkins v. Virginia*,<sup>16</sup> that the Eighth Amendment did serve as a *per se* bar to executing the mentally retarded,<sup>17</sup> it has become evident that even for a Supreme Court that generally supports the death penalty, its comfort with that ultimate punishment is eroding.

The fragile legal foundation for the death penalty is exposed further by the recent decision in *Roper v. Simmons*.<sup>18</sup> In *Roper*, the Supreme Court held by a 5-4 margin, that the Eighth and Fourteenth Amendments prohibited states from subjecting offenders who were under the age of 18 at the time of their capital offense to the death penalty.<sup>19</sup> *Roper* has been strongly criticized<sup>20</sup> for its reliance upon international law and result-

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<sup>11</sup> See *id.*

<sup>12</sup> *State v. Glass*, 455 So.2d 659 (La. 1985), *cert. denied*, 471 U.S. 1080 (1985).

<sup>13</sup> 20 F.3d 1050 (9th Cir. 1994), *cert. denied*, 511 U.S. 1119 (1994).

<sup>14</sup> 492 U.S. 302 (1989).

<sup>15</sup> *Id.* at 340.

<sup>16</sup> 536 U.S. 304 (2003).

<sup>17</sup> *Id.* at 321.

<sup>18</sup> 543 U.S. 551 (2005).

<sup>19</sup> *Id.* at 578.

<sup>20</sup> See, e.g., Richard Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 90 ("Strip *Roper v. Simmons* of its fig leaves—the psychological literature that it misused, the global consensus to which it pointed, the national consensus that it concocted by treating states that have no capital punishment as having decided that juveniles have a special claim not to be executed (the equivalent of saying that these states had decided that octogenarians deserve a special immunity from capital punishment)—and you reveal a naked political judgment."); Charles Babington, *Senate Links Violence to "Political" Decisions: 'Unaccountable' Judiciary Raises Ire*, WASH. POST, Apr. 5, 2005, at A07, available at <http://www.washingtonpost.com/wp-dyn/articles/A26236-2005Apr4.html>; Donald Kochan, *No Longer Little Known But Now a Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence*, 8 CHAP. L. REV. 103, 128 (2005) ("More fundamentally, however, the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.").

oriented manipulation of factors to overturn the recent precedents of *Thompson v. Oklahoma*<sup>21</sup> and *Stanford v. Kentucky*.<sup>22</sup>

*Roper* is likely to have only a limited impact on the actual number of executions in the United States because few individuals were sentenced to death for crimes they have committed before the age of eighteen.<sup>23</sup> Nonetheless, its collateral impact could be profound. The *Roper* decision may well provide a framework for applying the “evolving standards of decency” holding of *Trop v. Dulles*<sup>24</sup> to method-of-execution analysis, potentially spelling the end of certain executions based on perceived cruelty of the prescribed method of execution in the state of conviction, rather than demography or IQ.

Death by electrocution has become an enigma. This Note argues that the case against execution by electrocution has reached a crisis. Even the previously unassailable execution method of lethal injection has been assaulted by charges of cruelty in *Nelson v. Campbell*,<sup>25</sup> the publicity surrounding Michael Ross, who waived his appeals to become the first person executed in Connecticut since 1960,<sup>26</sup> and decisions by the Eighth Circuit<sup>27</sup> and a California district court<sup>28</sup> requiring modification of the execution protocols. While challenging the execution protocol itself is not a challenge to the constitutionality of lethal injection,<sup>29</sup> the end result may well be the same.<sup>30</sup> As a result of the Court’s 115 year refusal to hear method-of-execution cases, there is little or no illustrative precedent to facilitate meaningful understanding of what constitutes cruel and unusual punishment.

After *Atkins* and *Roper*, the death penalty faces an uncertain future as it is gradually eroded. However, because demographic assaults like

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<sup>21</sup> See 487 U.S. 815, 838 (1988) (holding that offenders under the age of 16 at the time of their capital offense could not be executed).

<sup>22</sup> 492 U.S. 361, 380 (1989) (holding that no “societal consensus” existed to require the exemption of 16 and 17 year old offenders from the death penalty).

<sup>23</sup> See *Roper*, 543 U.S. at 565 (noting that since 1995, only three states had executed people who were under 18 at the time of their offense); see also 543 U.S. at 615 (Scalia, J., dissenting) (“As for actual executions of under-18 offenders, they constituted 2.4% of the total executions since 1973.”).

<sup>24</sup> 356 U.S. 86 (1958).

<sup>25</sup> 541 U.S. 637 (2004).

<sup>26</sup> See *Execution in Connecticut: The Laws; One Execution is Unlikely to Hasten Others*, *Experts Say*, N.Y. TIMES, May 14, 2005, at B4.

<sup>27</sup> See *Crawford v. Taylor*, 126 S.Ct. 1192 (2006) (denying motion to vacate stay of execution granted by the Eighth Circuit); see also Mark Morris, *Missouri Asks for Speedy Resolution: Sides Map Strategies in Taylor’s Legal Case*, KANSAS CITY STAR, at B1.

<sup>28</sup> *Morales v. Hickman*, 2006 WL 335427, \*2 (N.D. Cal. 2006).

<sup>29</sup> *Id.* at \*2.

<sup>30</sup> See John M. Broder, *Questions over Method Lead to Delay of Execution*, N.Y. TIMES, Feb. 22, 2006, at A24 (“‘After this new order came down, the state came back and said they couldn’t comply,’ said John Grele, one of Mr. Morales’s lawyers. ‘They couldn’t find anyone to inject the chemicals to kill him.’”).

*Atkins* and *Roper* seem to be otherwise resolved or too uncertain to be relied upon by litigating defendants and the other most prominent demographic decision—*McCleskey v. Kemp*,<sup>31</sup> holding that individual defendants must establish that racial discrimination motivated their death sentence—is unlikely to be revisited by the current Court, it is minority methods of execution that will likely elucidate the earliest and most significant effects of the *Atkins/Roper* evolution.

Using Nebraska's electric chair as a point of departure, this Note assesses the potentiality of an important shift in Eighth Amendment jurisprudence: a return to method-of-execution analysis. Part I summarizes the Supreme Court's treatment of the electric chair, from the first electrocution case, *In re Kemmler*,<sup>32</sup> to the present. Part II discusses subsequent case law from the lower courts on electrocution and assesses its infirmities. Part III demonstrates that "the evolving standards of decency that mark the progress of maturing society"<sup>33</sup> no longer support execution by electrocution. The Note concludes with thoughts on what the abolition of death by electrocution could mean to method-of-execution analysis and the death penalty in general.

## I. THE ELECTROCUTION CASES

### A. THE *KEMMLER* DECISION

William Kemmler was an illiterate vegetable peddler whose murder of his lover Matilda Ziegler made him the guiding force behind the majority of American executions for nearly ninety years.<sup>34</sup> It was August 6, 1890, in Auburn, New York, when Kemmler became a historical footnote as the first American executed by electrocution.<sup>35</sup> The effect of his case on the American legal system lingers to this day.

The path of *In re Kemmler* appears strikingly familiar to those who have followed the development of death penalty precedent. The Court of Appeals of New York rejected Kemmler's claim that electrocution was cruel and unusual and affected a deprivation of his life without due process of law,<sup>36</sup> affirming the lower court and denying his petition for a writ of habeas corpus.<sup>37</sup> The decision might have been motivated in part by celebrities eager to test a miracle of modern science on an available

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<sup>31</sup> 452 U.S. 920 (1987).

<sup>32</sup> 136 U.S. 436 (1890).

<sup>33</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1956).

<sup>34</sup> See generally CRAIG BRANDON, *THE ELECTRIC CHAIR: AN UNNATURAL HISTORY* 90–105 (1999).

<sup>35</sup> *Id.* at 7.

<sup>36</sup> See *People ex rel. Kemmler v. Durston*, 24 N.E. 6, 6 (1890).

<sup>37</sup> *Id.* at 9.

felon,<sup>38</sup> Kemmler petitioned the Supreme Court for a writ of error,<sup>39</sup> arguing that death by electrocution constituted cruel and unusual punishment in violation of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment.<sup>40</sup>

Chief Justice Melville Fuller delivered the Court's opinion that a state's determination that the punishment of electrocution was not cruel and unusual was not available for Supreme Court review.<sup>41</sup> The Court embraced the findings of the New York Supreme Court that the evidence was "'clearly in favor of the conclusion that it is within easy reach of electrical science at this day to so generate and apply . . . a current of electricity of such known and sufficient force as certainly to produce *instantaneous*, and, therefore, *painless*, death.'"<sup>42</sup>

Thus, William Kemmler's date with the electric chair would not be obstructed by the Constitution. The lack of skepticism by the Supreme Court is alarming, given the New York Supreme Court's further declaration that "[i]t detracts nothing from the force of the evidence in favor of this conclusion that we do not know the nature of electricity, nor how it is transmitted in currents, nor how it operates to destroy the life of animals and men exposed to its force."<sup>43</sup> Furthermore, the New York Court of Appeals had demonstrated its own flagrant disregard for even the most cursory review of prisoner's rights by determining that neither expert nor lay witness testimony could be introduced to counter the legislative determination that the electric chair was painless.<sup>44</sup> Nonetheless, given that this was a Supreme Court adjudicating prior to the period of the incorporation of the Eighth Amendment against the states,<sup>45</sup> a more searching inquiry was unlikely. Moreover, because there had been no previous execution by electrocution in the world, the factual findings seemed perfectly reasonable. Soon enough, however, that certainty would perish with Kemmler in a cloud of sparks and smoke.

## B. THE KEMMLER EXECUTION

It was a little over two months after the Supreme Court's decision before Kemmler actually faced the electric chair. At 6:32 a.m. on August

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<sup>38</sup> Among others, Thomas Edison urged the use of electricity for the execution, particularly the alternating current of his rival George Westinghouse's alternating current, to promote his own direct current. *Id.* at 7-12.

<sup>39</sup> *In re Kemmler*, 136 U.S. 436, 438.

<sup>40</sup> *Id.* at 445.

<sup>41</sup> *See id.* at 449.

<sup>42</sup> *Id.* at 443 (quoting *People ex rel. Kemmler v. Durston*, 7 N.Y.S. 813, 818 (N.Y. Sup. Ct. 1889) (emphasis added)).

<sup>43</sup> *People ex rel. Kemmler v. Durston*, 7 N.Y.S. 813, 818.

<sup>44</sup> *In re Kemmler*, 136 U.S. 436 (1890) (citing *People ex rel. Kemmler v. Durston*).

<sup>45</sup> The recognized incorporation of the Eighth Amendment took place in *Robinson v. California*, 370 U.S. 660, 666 (1962).

6, William Kemmler was led into the execution chamber, clad in a three-piece suit,<sup>46</sup> set to be the first human to die in the electric chair. He was strapped into the chair, introduced to the spectators at the execution, and masked.<sup>47</sup> A switch was thrown in an adjacent room, creating a noise audible in the execution chamber.<sup>48</sup> The first execution by electrocution had begun.

Upon the first administration of current, Kemmler's fingers appeared to grab the chair and the nail of his right index finger cut through his palm.<sup>49</sup> After seventeen seconds, the current—now two thousand volts—was stopped.<sup>50</sup> Witnesses celebrated Kemmler's apparent death. One exclaimed, "There is the culmination of ten years' work and study . . . . We live in a higher civilization from this day!"<sup>51</sup> A doctor's examination, however, revealed that the cut on Kemmler's hand still dripped blood, indicating that he was still alive, and the order was given to turn the current on again.<sup>52</sup> Froth came from Kemmler's mouth while the voltage in the generator slowly increased, and witnesses heard Kemmler emitting a "heavy sound" as though he were struggling to breathe.<sup>53</sup> Many witnesses turned away from the ghastly sight, one fled the room, and another lay on the floor.<sup>54</sup> Kemmler's living body waited two minutes for the voltage to be administered again.<sup>55</sup>

At last, the application of current resumed, this time lasting between 70 seconds to four and a half minutes, varying by witness accounts.<sup>56</sup> Smoke rose from Kemmler's body as it sizzled, resulting from a loosened electrode on Kemmler's head, now burning from sparks.<sup>57</sup> The current was turned off again, and the state of New York had successfully killed William Kemmler in eight minutes.<sup>58</sup> Although the doctors agreed there was not even an "iota of pain," spectators debated the source of the sounds.<sup>59</sup> An autopsy, conducted three hours after the electrocution, revealed that Kemmler's brain was 97°F and had been partly burned. Burns were also observed along the base of his spine.<sup>60</sup>

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<sup>46</sup> See BRANDON, *supra* note 34, at 173.

<sup>47</sup> *Id.* at 174-75.

<sup>48</sup> *Id.* at 176.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 177.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 178.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*



C. FROM *IN RE KEMMLER* TO "EVOLVING STANDARDS"

The horrors accompanying Kemmler's execution did nothing to dampen the fervor for electrocution in the United States; by 1915, twelve states had adopted electrocution as a method of execution.<sup>61</sup> In *Malloy v. South Carolina*,<sup>62</sup> the next Supreme Court case to engage with electrocution, the Court considered Joe Malloy's challenge to the change in the method of his execution as an *ex post facto* law.<sup>63</sup> Convicted in 1910 of murder, Malloy's sentence was originally execution by hanging,<sup>64</sup> but two years later, South Carolina adopted electrocution for all capital crimes.<sup>65</sup> In dicta, the Court took judicial notice of "well-known facts" to support the belief that electrocution was more humane than hanging, while referring mere sentences later to electrocution's humane nature as a "well-grounded belief."<sup>66</sup> Without examining *Kemmler*'s questionable factual underpinnings, the Court held that the change did not constitute an *ex post facto* law.<sup>67</sup>

Thirty-two more years would pass before the Court would give even tangential consideration to electrocution, in the case of a failed execution in Louisiana.<sup>68</sup> Once in the electric chair, convicted murderer Willie Francis received an administration of current that was insufficient to kill him.<sup>69</sup> Louisiana thus sought a second death warrant that would allow them to attempt a second execution of Francis. The *Kemmler* decision largely escaped the Supreme Court's scrutiny unscathed.<sup>70</sup> In upholding the grant of the second warrant, the Court mentioned, "[a]s nothing has been brought to our attention to suggest the contrary, we must and do assume that the state officials carried out their duties under the death warrant in a careful and humane manner."<sup>71</sup> The plurality opinion further announced that "[t]he Fourteenth [Amendment] would prohibit by its due process clause execution by a state in a cruel manner."<sup>72</sup> In what would hardly be the last disregard for the text of *In re Kemmler*, Justice Reed noted that "the *Kemmler* case denied that electrocution infringed the federal constitutional rights of a convicted criminal sentenced to execu-

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<sup>61</sup> *Malloy v. South Carolina*, 237 U.S. 180, 185 (1915).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 183.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 181; An Act of Feb. 17, 1912, No. 402, 1912 S.Car. Acts 702.

<sup>66</sup> *Id.* at 185 (citing *State v. Tomassi*, 69 A. 214 (N.J. 1918) and *In re Storti*, 60 N.E. 210 (Mass. 1901)).

<sup>67</sup> *Id.* at 184.

<sup>68</sup> *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

<sup>69</sup> *Id.* at 461.

<sup>70</sup> *Id.* at 464.

<sup>71</sup> *Id.* at 462.

<sup>72</sup> *Id.* at 463.

tion,"<sup>73</sup> while obfuscating the lack of individual constitutional rights under the Eighth Amendment in operation against states. In his concurrence, Justice Frankfurter made no mention of *Kemmler* or *Malloy*, but used his concurrence to decry the use of the Fourteenth Amendment to incorporate the Bill of Rights.<sup>74</sup>

The dissent approached the case deliberately, explaining that Louisiana's statute only authorized electrocution in a form that avoided suffering, and allowed for only one administration of current.<sup>75</sup> Strikingly, Justice Burton noted, "[In *Kemmler*,] this Court stressed the fact that the electric current was to cause instantaneous death . . . it was the resulting 'instantaneous' and 'painless' death that was referred to as 'humane.'"<sup>76</sup> The dissenters read the death penalty statute literally and condemned the attempt to seek a second warrant because of a failed electrocution, when "[i]t was the statutory duty of the state officials to make sure that there was no failure."<sup>77</sup>

Willie Francis was strapped into the chair a second time just under four months after the Supreme Court denied his appeal.<sup>78</sup> His second execution was successful.<sup>79</sup>

Aside from denials of certiorari,<sup>80</sup> the Supreme Court has not addressed the electric chair since 1947. *Trop v. Dulles*,<sup>81</sup> the post-*Kemmler* decision that may have the most substantive impact on method-of-execution analysis, was handed down in 1957. The appellant in *Trop*, a native-born U.S. citizen, effectively challenged the rescission of his citizenship as punishment following a court martial for wartime desertion.<sup>82</sup> The Court held that rendering a person stateless had no purpose except for punishing the individual, and the decision of the military tribunal was thus an application of penal law that was governed by the Eighth Amendment.<sup>83</sup> The Court distinguished the death penalty, reasoning that:

<sup>73</sup> *Id.* at 462.

<sup>74</sup> *Id.* at 466-71 (Frankfurter, J., concurring).

<sup>75</sup> *Id.* at 474-75 (Burton, J., concurring).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 477.

<sup>78</sup> See BRANDON, *supra* note 34, at 234-35.

<sup>79</sup> *Id.* at 235.

<sup>80</sup> See *Campbell v. Wood*, 511 U.S. 1119 (1994) (Blackmun, J., dissenting from denial of cert.); *Glass v. Louisiana*, 471 U.S. 1080 (1985) (Brennan, J., dissenting from denial of cert.). The Court had granted certiorari to a challenge against Florida's frequently malfunctioning electric chair, see *Bryan v. Moore*, 528 U.S. 960 (1999), but dismissed the writ of certiorari as improvidently granted once Florida responded by adopting lethal injection as its default method of execution, see *Bryan v. Moore*, 528 U.S. 1133 (2000).

<sup>81</sup> 356 U.S. 86 (1957).

<sup>82</sup> *Id.* at 88.

<sup>83</sup> *Id.* at 97.

[w]hatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. But it is equally plain that the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination.<sup>84</sup>

The Court described the basis of the Eighth Amendment as “nothing less than the dignity of man[.]”<sup>85</sup> and stated, “[t]his Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising.”<sup>86</sup> Statelessness, contended the Court, is a punishment more depraved than torture, and among civilized nations, there is “virtual unanimity” that statelessness is not an available criminal penalty.<sup>87</sup>

## II. THE LOWER COURTS

The Supreme Court’s reasoning in *Trop* was somewhat surprising from a Court that sent a man back to the electric chair just ten years earlier. Since the *Trop* holding, the Court has recognized that “the words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>88</sup> Under the progressive standards of the “dignity of man” and “evolving standards of decency that mark the progress of a maturing society,” coupled with the Eighth Amendment’s application of the cruel and unusual punishment bar to the states in *Robinson v. California*,<sup>89</sup> it seemed that no precedent as fragile as *In re Kemmler* could withstand scientific discovery and the availability of less haunting forms of execution. American legal history, however, has told an entirely different story.

### A. THE CIRCUIT COURTS

Although the Supreme Court’s early Eighth Amendment cases at least nominally focused on the constitutionality of particular execution methods, after the progressive standards of *Trop* were announced, the

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<sup>84</sup> *Id.* at 99.

<sup>85</sup> *Id.* at 100.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 101-03.

<sup>88</sup> *Id.* at 100-01.

<sup>89</sup> 370 U.S. 660 (1962).

Court seemingly turned its back on method-of-execution analysis, instead chipping away instead at death-eligible offenses<sup>90</sup> and demographic eligibility for the death penalty.<sup>91</sup> For over one hundred years, the Supreme Court has not addressed whether electrocution constitutes cruel and unusual punishment.<sup>92</sup> Furthermore, the lower federal and state courts have little guidance from the Supreme Court against which to assess the constitutionality of any method of execution.<sup>93</sup> In place of such precedent, courts have largely relied upon *In re Kemmler*.<sup>94</sup> The outcomes, as a result, are often alarming.

Although the Fourth Circuit is the only federal circuit court to recognize openly that *Kemmler* is hardly conclusive, it nonetheless continues to rely upon it.<sup>95</sup> The Fourth Circuit heard a method of execution challenge as part of *Poyner v. Murray*,<sup>96</sup> and rejected it, saying that "if narrowly read," *Kemmler* did not stand as precedent for the constitutionality of electrocution as a method of execution.<sup>97</sup> Nonetheless, combining an unholy triumvirate of *Kemmler* and its progeny,<sup>98</sup> non-merits determinations,<sup>99</sup> and dicta,<sup>100</sup> with a number of poorly construed opinions,<sup>101</sup> the Fourth Circuit held in *Poyner* that electrocution is not cruel and unusual.

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<sup>90</sup> See *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

<sup>91</sup> See *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>92</sup> See *Poyner v. Murray*, 508 U.S. 931, 931 (1993) (Souter, J., concurring in denial of cert).

<sup>93</sup> See Roberta M. Harding, *The Gallows to the Gurney: Analyzing the (Un)Constitutionality of Methods of Execution*, 6 B.U. PUB. INT'L L.J. 153, 154-55 (1996).

<sup>94</sup> See *infra* notes 95, 98.

<sup>95</sup> See *Ralph v. Warden, Maryland Penitentiary*, 438 F.2d 786, 789 (4th Cir. 1970) ("By implication the Court has approved the death penalty by stating that shooting and electrocution are not cruel and unusual forms of execution.") (citing *In re Kemmler*, 136 U.S. 436 (1890) and *Wilkerson v. Utah*, 99 U.S. 130 (1878)).

<sup>96</sup> No. 93-6052, 1993 U.S. App. LEXIS 38227, at \*5 (4th Cir. Jan. 19, 1993).

<sup>97</sup> *Id.* at \*5.

<sup>98</sup> *Lindsey v. Smith*, 820 F.2d 1137, 1155 (11th Cir. 1987) (noting that claim is precluded by *Johnson v. Kemp*, 759 F.2d 1503 (11th Cir. 1985)); *Wilson v. Butler*, 812 F.2d 664 (5th Cir. 1987) (relying on *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978)); *Funchess v. Wainwright*, 788 F.2d 1443 (11th Cir. 1986) (relying on *Spinkellink*, arguing that precedent forecloses the Eighth Amendment claim with no regard for *Trop* analysis); *Johnson v. Kemp*, 759 F.2d 1503, 1510 (11th Cir. 1985) (finding contention "frivolous"); *Sullivan v. Dugger*, 721 F.2d 719 (11th Cir. 1983) (relying on *Spinkellink*); *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978) (relying on *In re Kemmler*, 136 U.S. 436 (1890)).

<sup>99</sup> *Porter v. Wainwright*, 805 F.2d 930 (11th Cir. 1986) (finding that Eighth Amendment claim was barred because it was not brought up in petitioner's original appeal).

<sup>100</sup> *Ralph*, 438 F.2d 786; *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968) (noting that electrocution was permitted by *In re Kemmler*, 136 U.S. 436 (1890), in a case regarding the constitutionality of the strap and corporal punishment).

<sup>101</sup> See *Jones v. Whitley*, 938 F.2d 536 (5th Cir. 1991) (arguing that cause and prejudice test of *McCleskey v. Zant*, 499 U.S. 467 (1991), barred claim of electric chair's cruelty because "[h]is complaints about the malfunctioning of Louisiana's electric chair do not show that

Thanks to the frequent malfunctions of Florida's electric chair, the Fifth Circuit, and now the Eleventh Circuit, have long produced cases that reproduce the errors of post-*Kemmler* Eighth Amendment analysis: a reliance on outdated factual determinations and dicta. The first prominent case was *Spinkellink v. Wainwright*,<sup>102</sup> in which the appellate court rejected the claim, *inter alia*, that death by electrocution violates the Eighth Amendment.<sup>103</sup> After his failed challenge, Spinkellink became the first person executed after the Supreme Court's ruling in *Furman v. Georgia*.<sup>104</sup> Since *Spinkellink*, malfunctions have been frequent in Florida, with fire shooting from the heads of two men (Jesse Tafero and Pedro Medina) during their executions<sup>105</sup> and one prisoner emerging from his electrocution with a bloodied head,<sup>106</sup> that Florida attributed to an unrelated nosebleed during the execution.<sup>107</sup> Nonetheless, the *Spinkellink* decision still shapes the case law of the Fifth and Eleventh Circuits and plays a substantial role in the Fourth Circuit,<sup>108</sup> even though it suffers from an all-too-familiar deficiency, a truly heroic reliance on the dicta and outdated factual determinations of *In re Kemmler*.

The Circuits varied in their approach, periodically abandoning *Spinkellink* entirely, as in *Corn v. Zant*.<sup>109</sup> In *Corn*, the Eleventh Circuit relied on the Supreme Court precedents of *Gregg v. Georgia*<sup>110</sup> and *Coker v. Georgia*<sup>111</sup> to determine that electrocution is constitutional. *Gregg* upheld Georgia's death penalty statute,<sup>112</sup> but did not engage in any method-of-execution analysis. *Coker*, meanwhile, determined that the death penalty was grossly excessive punishment for a charge of rape.<sup>113</sup> Then, in *Watson v. Blackburn*,<sup>114</sup> which was decided two years

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it is inoperable or any more inhumane than it ever was when previous constitutional challenges were rejected."); *Lowenfield v. Phelps*, 817 F.2d 285 (5th Cir. 1987) (adopting rationale of district court, 671 F.Supp. 423 (E.D. La. 1987), which concluded that *Gregg v. Georgia*, 428 U.S. 153 (1976) adversely determined method-of-execution claim); *Watson v. Blackburn*, 756 F.2d 1055 (per curiam) (noting that contention is without merit); *Corn v. Zant*, 708 F.2d 549 (11th Cir. 1983) (relying on two non-method-of-execution determinations to contend that electrocution had been deemed permissible).

<sup>102</sup> 578 F.2d 582 (5th Cir. 1978).

<sup>103</sup> *Id.* at 616.

<sup>104</sup> 408 U.S. 238 (1972).

<sup>105</sup> See Jonathan Simon, *Book Review: Why Do You Think They Call It CAPITAL Punishment?: Reading the Killing State*, 36 LAW AND SOC'Y REV. 783, 801 (2002) (discussing botched electrocutions in Florida).

<sup>106</sup> See *id.*; see also Allen Lee "Tiny" Davis, at <http://www.clarkprosecutor.org/html/death/US/davis558.htm>.

<sup>107</sup> See *Provenzano v. Moore*, 744 So.2d 413, 414 (1999).

<sup>108</sup> *Poyner v. Murray*, No. 93-6052, 1993 U.S. App. LEXIS at \*4 (4th Cir. Jan. 19, 1993).

<sup>109</sup> 708 F.2d 549, 563 (11th Cir. 1983).

<sup>110</sup> 428 U.S. 153 (1976).

<sup>111</sup> 433 U.S. 584 (1977).

<sup>112</sup> 428 U.S. at 207.

<sup>113</sup> See 433 U.S. at 600.

<sup>114</sup> 756 F.2d 1055 (5th Cir. 1985).

after *Corn* (and seven years after *Spinkellink*), the Fifth Circuit offered no further answer to the method-of-execution challenge, except to conclude in a footnote that the contention that electrocution constitutes cruel and unusual punishment is without merit.<sup>115</sup> The Eleventh Circuit employed a similar approach in *Lindsey v. Smith*,<sup>116</sup> wrongly using precedent to bar the claim without citing the proper case.<sup>117</sup>

In *Wilson v. Butler*,<sup>118</sup> the Fifth Circuit rejected an Eighth Amendment claim, declaring:

The petitioner's twelfth contention is that electrocution, which is Louisiana's method of carrying out a capital sentence, would inflict wanton and unnecessary torture and torment upon petitioner. Electrocution as the method of carrying out a sentence of capital punishment is constitutional. Petitioner's claim is without merit.<sup>119</sup>

The Sixth Circuit was similarly reticent to give the claim a forum. For instance, in the case of *Coe v. Bell*, the Sixth Circuit summarily affirmed the district court's rejection of Eighth Amendment claims relating to electrocution.<sup>120</sup> When Ohio changed to lethal injection as the default method of execution,<sup>121</sup> the Circuit had an easy opportunity to rid themselves of the claim, by relying heavily on what could be described as the "choose or lose" doctrine adopted in *Stewart v. LaGrand*.<sup>122</sup> In *Stewart*, the Supreme Court held that petitioner's opportunity to choose a method of execution other than electrocution barred all Eighth Amendment claims relating to electrocution.<sup>123</sup>

In 1997, the Sixth Circuit held that the use of a § 1983 action to challenge an execution method constituted a second or successive habeas petition.<sup>124</sup> Furthermore, even if the court were to consider such a claim, it must still be rejected because the "legal bases for such a challenge"

<sup>115</sup> *Id.* at 1058, n.1.

<sup>116</sup> 820 F.2d 1137 (11th Cir. 1987).

<sup>117</sup> *Id.* at 1155. The court cited *Johnson v. Kemp*, 781 F.2d 1570 (11th Cir. 1986), a decision wholly unrelated to the Eighth Amendment. Most likely, the court intended to cite *Johnson v. Kemp*, 759 F.2d 1503 (11th Cir. 1986), but even this case merely noted that the claim was "frivolous" and gave no substantive reason to bar future claims.

<sup>118</sup> 813 F.2d 664 (5th Cir. 1987).

<sup>119</sup> *Id.* at 678 (citation omitted).

<sup>120</sup> See 161 F.3d 320, 341-42 (6th Cir. 1998).

<sup>121</sup> OHIO REV. CODE ANN. § 2949.22 (2003). This statute became effective November 21, 2001. See *Cowans v. Bagley*, 236 F.Supp.2d 841, 871 (S.D. Ohio 2002).

<sup>122</sup> See 526 U.S. 115, 119 (1999) (per curiam).

<sup>123</sup> *Id.*; See also *Greer v. Mitchell*, 264 F.3d 663 (6th Cir. 2001) (noting that choice makes Eighth Amendment question "unimportant").

<sup>124</sup> *In re Sapp*, 118 F.3d 460, 461 (6th Cir. 1997).

had been evident for many years,<sup>125</sup> citing *Kemmler* and the Eleventh Circuit opinion in *Porter v. Wainwright*.<sup>126</sup> The Sixth Circuit's reliance on the Eleventh Circuit opinion as substantial precedent for a Sixth Circuit case is particularly dubious after reading *Porter*, where the court merely declares that the Eighth Amendment claim was procedurally barred and would otherwise have been barred on the merits by *Sullivan v. Dugger*.<sup>127</sup> Nonetheless, the Sixth Circuit relied on the ready availability of the evidence to dismiss the claim, even if jurisdiction was proper, noting "[e]ven though, in petitioner's mind, every year or every day may bring new support for his arguments, the claims themselves have long been available, and have needlessly and inexcusably been withheld."<sup>128</sup> Furthermore, the court engages in a sleight-of-hand of sorts to undermine future method-of-execution claims under the Eighth Amendment, remarking "[n]o legislatively authorized method of execution in the United States is outlawed in any jurisdiction by any currently effective court decision."<sup>129</sup> While the statement is accurate, it is somewhat deceptive, since the earlier decision in *Fierro v. Gomez*<sup>130</sup> enjoining the use of the gas chamber, was vacated by the Supreme Court.<sup>131</sup> The Supreme Court vacated the decision because *Fierro* had been adopted by California's legislature,<sup>132</sup> rendering the decision irrelevant unless future generations revert to the gas chamber as a method of execution.

The Eighth Circuit has employed procedural bars and substantial judicial discretion in granting evidentiary hearings in resolving Eighth Amendment claims. As a result, petitioners have consequently been foreclosed from offering evidence of cruelty in electrocution. For instance, the court noted in *Swindler v. Lockhart*<sup>133</sup> that a trial court has significant discretion to grant a continuance for the presentation of evidence.<sup>134</sup> And, in *Williams v. Hopkins*,<sup>135</sup> the Eighth Circuit ruled that a § 1983 action constituted a successive habeas petition and therefore was procedurally barred.<sup>136</sup> However, the Court, seemingly ignoring the admonitions of *Trop*, added that the Eighth Amendment claim was both barred

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<sup>125</sup> *Id.* at 464 (citing *In re Kemmler*, 136 U.S. 436 (1890); *Porter v. Wainwright*, 805 F.2d 930 (11th Cir. 1986)).

<sup>126</sup> *Id.*

<sup>127</sup> *Porter v. Wainwright*, 805 F.2d 930, 942.

<sup>128</sup> *In re Sapp*, 118 F.3d at 464.

<sup>129</sup> *Id.* (citing *Gomez v. Fierro*, 519 U.S. 918 (1996); *Rupe v. Wood*, 93 F.3d 1434 (9th Cir. 1994)).

<sup>130</sup> 77 F.3d 301 (9th Cir. 1996).

<sup>131</sup> See *Gomez v. Fierro*, 519 U.S. 918 (1996) (citing CAL. PENAL CODE § 3604(b) (West Supp. 1996)).

<sup>132</sup> See *id.*

<sup>133</sup> 885 F.2d 1342 (8th Cir. 1989).

<sup>134</sup> *Id.* at 1350.

<sup>135</sup> 130 F.3d 333 (8th Cir. 1997).

<sup>136</sup> *Id.* at 336.

by precedent and frivolous, as no court had ever accepted such an argument.<sup>137</sup> Two years previously, the court rejected another Eighth Amendment challenge by the same petitioner on the grounds that he had raised the issue in his *pro se* petition to the district court and subsequently abandoned it.<sup>138</sup>

## B. THE STATE COURTS

Since *In re Kemmler*, 4,342 men and women have been executed via electrocution by twenty-six states and the District of Columbia.<sup>139</sup> Appeal after appeal has been held barred by the *Kemmler* holding or otherwise dismissed. Each state has developed its own systemic response to Eighth Amendment claims, but the ultimate response by states has clearly favored alternate methods of execution.

In 2001, the first judicial breakthrough occurred when the Georgia Supreme Court handed down a 5-4 decision prohibiting electrocution as cruel and unusual punishment under the Georgia Constitution.<sup>140</sup> The Court had expressed reservations about electrocution for a number of years, but generally disposed of the issue on procedural or evidentiary grounds.<sup>141</sup> Earlier in the year, the state legislature had enacted an escape provision: if an authoritative court found electrocution to be cruel and unusual, all executions would take place by lethal injection.<sup>142</sup> The court remarked that the legislature, in enacting this provision, had found that there was a consensus that the “science of our day” had discovered that lethal injection was a less barbarous and painful method of execution.<sup>143</sup> This of course, represented some irony, given the oft-cited proposition that electrocution constituted a genuinely painless death.<sup>144</sup>

Perhaps more than any other state, Florida’s courts have brought to light the ongoing struggle over the electric chair and have become a flashpoint for both supporters and opponents of electrocution. Following the disastrous execution of Pedro Medina, where flames appeared near the headpiece and smoke rose from the prisoner’s head,<sup>145</sup> Florida’s courts were faced with a spate of challenges to its frequently-malfunctioning electric chair. Leo Jones challenged his sentence to die in the

<sup>137</sup> *Id.* at 337. This is no longer true. See *infra*, Part II, §B.

<sup>138</sup> *Williams v. Clarke*, 40 F.3d 1529, 1533-34 (8th Cir. 1995).

<sup>139</sup> See BRANDON, *supra* note 34, at 246; see also DEATH PENALTY INFORMATION CENTER, METHODS OF EXECUTION, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=245>.

<sup>140</sup> See *Dawson v. State*, 554 S.E.2d 137 (Ga. 2001). The relevant provision in the Georgia Constitution reads: GA. CONST., art.I, § 1, para. XVII (2005).

<sup>141</sup> See *Dawson*, 554 S.E.2d at 140-41.

<sup>142</sup> As amended, see O.C.G.A. §17-10-38 (2005).

<sup>143</sup> *Dawson*, 554 S.E.2d at 144.

<sup>144</sup> See, e.g., *In re Kemmler*, 136 U.S. 436 (1890).

<sup>145</sup> See BRANDON, *supra* note 34, at 2.



electric chair on the grounds that Florida's electric chair was cruel and unusual, litigating the issue primarily on the results of the Medina execution. A lower court rejected Jones' claim, finding that Medina suffered no "conscious pain" because his brain was "depolarized in milliseconds," that the chair was in working order, and that future inmates would suffer no pain during electrocution.<sup>146</sup> The court openly neglected the dual standards recognized in *Trop*—"dignity of man" and "evolving standards of decency"<sup>147</sup>—determining that cruel and unusual punishment required the "wanton infliction of unnecessary pain."<sup>148</sup> The Supreme Court of Florida rejected the contention that Florida demonstrated "deliberate indifference to their prisoners'" well-being by placing them in the electric chair, and held it to be completely meritless.<sup>149</sup>

In contrast, the dissent contended that, "[t]o meet the requirement that a punishment not be cruel on its face, a method of execution should entail no unnecessary violence or mutilation[;]" arguing that without such a limitation, there existed no clear reason to reject the guillotine as a method of execution.<sup>150</sup> Justice Leander Shaw reiterated the disasters accompanying the execution of Jesse Tafero and Pedro Medina and declared,

[t]he bottom line is inexorable: In two out of eighteen executions, i.e., in eleven percent of executions, carried out during this relatively brief period, the condemned prisoner was engulfed in smoke, flames, and the odor of burning material—which some observers described as the stench of burning or roasting flesh—when the switch was pulled.<sup>151</sup>

The dissent compared electrocution executions to the guillotine or burning at the stake, but the rhetoric did not carry the day. On the basis of a 4-3 decision, maintained only by a special concurrence by Justice Major B. Harding, noting that "[p]erhaps Florida's legislature should consider [lethal injection]"<sup>152</sup> and invoking *Fierro v. Gomez*,<sup>153</sup> Jones was sent to die in Florida's electric chair.

Two years and one more headline-grabbing botched execution later, the Florida Supreme Court again reviewed the constitutionality of the electric chair.<sup>154</sup> The Supreme Court accepted the factual determina-

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<sup>146</sup> See *Jones v. Butterworth*, 701 So.2d 76, 77 (Fla. 1997).

<sup>147</sup> *Trop v. Dulles*, 356 U.S. 86 (1958).

<sup>148</sup> *Jones*, 701 So.2d at 77-78.

<sup>149</sup> *Id.* at 79.

<sup>150</sup> *Jones*, 701 So.2d at 84. (Shaw, J., dissenting).

<sup>151</sup> *Id.* at 87 (Shaw, J., dissenting).

<sup>152</sup> *Id.* at 80-81.

<sup>153</sup> 77 F.3d 301 (9th. Cir. 1996).

<sup>154</sup> *Provenzano v. Moore*, 744 So.2d 413 (Fla. 1999).

tions of the lower court that Allen Lee Davis suffered an instantaneous and painless death and that the mouth straps may have caused discomfort—but not severe and wanton pain.<sup>155</sup> This time, however, the court admitted that electrocution “may involve some degree of pain[.]”<sup>156</sup> Again, the justices lined up as they did in *Jones* and sent Thomas Provenzano to the electric chair by a single vote.<sup>157</sup> Newly-elevated Chief Justice Harding again joined the 4-3 majority and wrote a special concurrence: “I urge the Legislature to revisit this issue and pass legislation giving death row inmates the choice between lethal injection and electrocution as the method of carrying out the death penalty.”<sup>158</sup> Justice Peggy Quince also added a special concurrence, and remarked that the real question underlying the case is whether electrocution is appropriate under the “evolving standards” doctrine of *Trop*.<sup>159</sup>

Justice Shaw dissented again, this time emphasizing that despite Florida’s attempt to utilize *Jones v. Butterworth* as barring precedent, the Court had never addressed the *per se* constitutionality of the electric chair.<sup>160</sup> Shaw observed the vast number of cases where the electric chair’s constitutionality was accepted without serious reflection, noting eight different cases in which the Court held the issue procedurally barred or meritless.<sup>161</sup> He commented on the inappropriate reliance on *Kemmler* that had shaped 109 years of electrocutions, “[t]hat case is still the seminal case in this field and, contrary to popular belief, does not stand for the proposition that electrocution is *per se* lawful *ad infinitum* if there is no pain.”<sup>162</sup> Shaw closed, adding that the Humane Society of the United States and the American Veterinarian Medical Association had both condemned the use of electrocution as a method of euthanasia for pets and that even Florida’s Corrections Commission had recommended that lethal injection be adopted.<sup>163</sup> In 2000, the Florida legislature amended FLA. STAT. § 922.105 to make lethal injection the default method of execution unless the condemned person affirmatively chooses electrocution.<sup>164</sup>

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<sup>155</sup> *Id.* at 414.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 416.

<sup>158</sup> *Id.* at 416-17 (Harding, C.J., specially concurring).

<sup>159</sup> *Id.* at 420 (Quince, J., specially concurring).

<sup>160</sup> *Id.* at 424 (Shaw, J., dissenting).

<sup>161</sup> *Id.* at 425 (Shaw, J., dissenting).

<sup>162</sup> *Id.* at 426 (Shaw, J., dissenting).

<sup>163</sup> *Id.* at 436-37 (Shaw, J., dissenting).

<sup>164</sup> See FLA. STAT. § 922.105 (as amended 2000).

## C. NEBRASKA – THE LAST HOLDOUT

Nebraska's state courts have been among the least receptive to arguments against the constitutionality of the electric chair. In 1967, the Nebraska Supreme Court rejected to an Eighth Amendment claim in *State v. Alvarez*, holding "electrocution as punishment for crime is not a cruel and unusual punishment within the meaning of the state and federal Constitutions[.]"<sup>165</sup> It cited only *In Re Kemmler* and *Malloy v. South Carolina* as binding precedent.<sup>166</sup> When the claim was raised again twenty-eight years later in *State v. Ryan*,<sup>167</sup> the response of the state's highest court was suspiciously familiar. The court held that *Alvarez* controlled.<sup>168</sup> In 2000, with only Nebraska, Alabama, Florida, and Georgia on the list of states which practiced electrocution as a mandatory execution practice, the response was the same, citing *Ryan* as the controlling precedent.<sup>169</sup> In 2005, the Nebraska Supreme Court was faced with another challenge to electrocution as cruel and unusual, but did not address the issue because the petitioner was to be resentenced, and thus, did not necessarily face the death penalty.<sup>170</sup> The court commented that "recent events . . . may cast doubt upon whether [the U.S. Supreme] Court will continue to regard electrocution as consistent with the Eighth Amendment."<sup>171</sup> Nonetheless, there has been no indication that the Nebraska Supreme Court would play any role in eliminating the electric chair.

## III. WHAT ARE TODAY'S EVOLVING STANDARDS OF DECENCY?

In *Trop v. Dulles*, the Supreme Court assessed "evolving standards of decency," by relying upon a number of factors, including international authorities<sup>172</sup> and the legislative actions of the states.<sup>173</sup> In answering the related question of excessiveness, the Court has also considered the sentencing decisions juries have made<sup>174</sup> and the contribution a sentence makes to legitimate goals of punishment.<sup>175</sup> This section reviews these factors and factors later decisions have employed to assess evolving standards of decency. The evidence indicates that under these factors and

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<sup>165</sup> 154 N.W.2d 746, 751 (Neb. 1967).

<sup>166</sup> *Id.*

<sup>167</sup> 534 N.W.2d 766 (Neb. 1995).

<sup>168</sup> *Id.* at 777.

<sup>169</sup> *State v. Bjorklund*, 604 N.W.2d 169, 217 (Neb. 2000).

<sup>170</sup> *State v. Mata*, 668 N.W.2d 448, 478 (Neb. 2005).

<sup>171</sup> *Id.*

<sup>172</sup> *Roper v. Simmons*, 543 U.S. at 575-77.

<sup>173</sup> See, e.g. *id.* at 564-65; *Atkins v. Virginia*, 536 U.S. at 312.

<sup>174</sup> *Enmund v. Florida*, 485 U.S. 785, 788 (1979).

<sup>175</sup> See *Stanford v. Kentucky*, 492 U.S. 361, 379-80 (1989); *Enmund*, 458 U.S. at 801.

their application by the Supreme Court, evolving standards of decency appear to forbid further use of electrocution.

#### A. INTERNATIONAL DEVELOPMENTS

The war in Iraq and the War on Terror has, in some way, generated publicity for the use of electricity as a torture device. As information about the Abu Ghraib prison abuse scandal seeped into the media, one photograph seemed to appear with nearly every article or broadcast on Abu Ghraib's atrocities—a photograph of a prisoner standing on a cardboard box, his head in a black hood, and wires attached to each of his hands.<sup>176</sup> Still other prisoners were tortured with electrical wires attached to their genitals.<sup>177</sup> Furthermore, although Abu Ghraib was a source of torture stories to the media, word began to filter out from Guantanamo Bay, Cuba, and Afghanistan that American representatives were employing electrical torture abroad.<sup>178</sup>

While the war in Iraq dragged on and the search for weapons of mass destruction appeared increasingly futile, the White House posted on its official Web site a page entitled *Tales of Saddam's Brutality*, which consists of quotations from major publications about the abuses and tortures endured in Iraq under the rule of Saddam Hussein.<sup>179</sup> Electrical torture is one of the recurring themes.<sup>180</sup> The depictions are truly horrible, as they are intended to be, intending to prove the true inhumanity of Saddam Hussein's regime. Given the international backlash over the employment of even simulated electrocutions at Abu Ghraib<sup>181</sup> and the international condemnation for the use of electricity as punishment, it seems abundantly clear that electrocution, judicially ordered or not, is not regarded as permissible in a humane or beneficent society—or, apparently, even in many that are malevolent and cruel.

<sup>176</sup> <http://www.beamish.org/images/AbuGhraib-electric.jpg>.

<sup>177</sup> LTG ANTHONY R. JONES, U.S. ARMY, at 15-16, INVESTIGATION OF THE ABU GHRAIB PRISON AND THE 205TH MILITARY INTELLIGENCE BRIGADE (2004), <http://www.army.mil/ocpa/reports/ar15-6/AR15-6.pdf>.

<sup>178</sup> See Raymond Bonner, *Detainee Says He Was Tortured in U.S. Custody*, N.Y. TIMES, Feb. 1, 2005 at 1, available at <http://www.nytimes.com/2005/02/13/international/middleeast/13habib.html>.

<sup>179</sup> Available at <http://www.whitehouse.gov/infocus/iraq/tales.html>; see also *Iraq: A Population Silenced; Silence Through Torture*, <http://usinfo.state.gov/products/pubs/silenced/torture.htm>.

<sup>180</sup> Nineteen quotations refer to torture involving electricity. In comparison, only four quotations refer to the poison gas used on the Kurds prior to the first Gulf War. See *Tales*, *supra* note 179.

<sup>181</sup> See e.g., John Hendren, *The Conflict in Iraq; List of Detainee Death Inquiries Expanded to 37; The Pentagon's higher figure for Iraq and Afghanistan includes at least eight unresolved homicide cases that may have involved assaults*, L.A. TIMES, May 22, 2004., at A1; *Abuse Photos Enrage Arabs; 'Disgusted' Bush Vows Investigation After U.S. Guards Humiliate Prisoners*, CALGARY SUN, May 1, 2004, at 22.

Iraq is not alone, however. The world's most oppressive regimes frequently use electrical shock for interrogation or torture.<sup>182</sup> One significant example is Turkey, which in 2004 faced at least six electrical torture cases in the European Court of Human Rights.<sup>183</sup> Similarly, the use of electricity as a torture device, often resulting in death, appears on the laundry list of offenses charged against Augusto Pinochet.<sup>184</sup>

#### B. JUDICIAL CONSIDERATIONS OF EVOLVING STANDARDS

Recent decisions by the Supreme Court have indicated a broader reading of the *Trop* doctrine, indicating a lower threshold for establishing that a punishment is unconstitutional, at least against certain offenders.<sup>185</sup> While the cases do not confront method-of-execution issues, the expansion of *Trop* may nonetheless be significant for method-of-execution challenges.

Perhaps most significant to the future of electrocution in the United States is *Atkins v. Virginia*.<sup>186</sup> Its affirmation of the principles of *Trop v. Dulles* represents the most substantial elaboration of "evolving standards" demonstrated by the Supreme Court. Thirteen years earlier, *Penry v. Lynaugh*<sup>187</sup> raised the same issue. There the Court held that retardation served as a mitigating factor but did not preclude executing an offender who demonstrated proof of mental retardation.<sup>188</sup>

In *Atkins*, the Court referred to *Harmelin v. Michigan*,<sup>189</sup> noting that objective factors should be used to the extent that it is possible to determine excessiveness. It pinpointed, as in *Penry*, the legislatures of the states as the "clearest and most reliable evidence of contemporary values."<sup>190</sup> After noting the objective factors, however, the Court underscored its own discretion as a determinative factor.<sup>191</sup> The Court commented on the growing trend to abolish execution of the retarded:<sup>192</sup> "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change."<sup>193</sup> Because only five of the

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<sup>182</sup> See *Chahal v. United Kingdom*, 22 Eur. Ct. H.R. 1831 (1996) (challenging Punjab policemen's use of electrotorture on Sikhs).

<sup>183</sup> See, e.g., *Yaman v. Turkey*, App. No. 32446/96 Eur. Ct. H.R. (2004); *Ozkan v. Turkey*, App. No. 21689/93 Eur. Ct. H.R. (2004).

<sup>184</sup> See *Regina v. Evans, Ex Parte Pinochet Ugarte*, 6 BHRC 24 (1999).

<sup>185</sup> See *supra*, part I (discussing *Atkins v. Virginia* and *Roper v. Simmons*).

<sup>186</sup> 536 U.S. 304 (2002).

<sup>187</sup> 492 U.S. 302 (1989).

<sup>188</sup> See *id.* at 340 (1989).

<sup>189</sup> 501 U.S. 957, 1000 (1991) (quoting *Rummel v. Estelle*, 445 U.S. 263, 274-75 (1980)).

<sup>190</sup> *Atkins*, 536 U.S. at 312.

<sup>191</sup> See *id.* at 312-314.

<sup>192</sup> See *id.* at 315 (counting at least twenty-one on-point bills that passed at least one chamber of a state legislature)

<sup>193</sup> *Id.*

states that do not bar execution of the retarded have actually engaged in it, the Court went on, “[it is] fair to say a national consensus has developed against it.”<sup>194</sup> Noting that there was no reason to disagree with the state legislatures, given that executing the mentally retarded would not likely achieve any retributive goals or serve as a deterrent, the Court held that the “evolving standards of decency” *Trop* attributed to the Eighth Amendment barred the execution of the retarded.<sup>195</sup>

Although *Atkins* assessed the excessiveness of a punishment within a narrow context, its application of *Trop*’s evolving standards doctrine and acknowledgment of legislative initiatives has wider ramifications. Although ten states still permit the electric chair,<sup>196</sup> it is only available upon the offender’s affirmative election in six of those states,<sup>197</sup> and is only available as a statutory substitute for lethal injection in the event that it is declared unconstitutional in three of those states.<sup>198</sup> Only Nebraska mandates its use in executions. The wholesale abandonment of the electric chair has been rapid since the introduction of lethal injection.<sup>199</sup> The numbers presented by the Court to demonstrate a shift in public opinion in *Atkins* pale in comparison to the data regarding use of the electric chair. Thus, the “clearest and most reliable evidence of contemporary values” shows virtual unanimity in opposition of electrocution as a method of execution. The direction of the change is even more dramatic: no state has enacted electrocution as its method of execution since West Virginia did so in 1949.<sup>200</sup>

Although Justice O’Connor had defected from the six-justice majority in *Atkins* in *Roper v. Simmons*,<sup>201</sup> the result in the latter case carried significant overtones for the flexibility and, even to proponents, seemingly arbitrary determination that ten generations of juvenile executions were enough. The Court used the *Trop* doctrine, observing that twenty

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<sup>194</sup> *Id.* at 316.

<sup>195</sup> *See id.* at 321.

<sup>196</sup> *See* Methods of Execution, available at <http://www.deathpenaltyinfo.org/article.php?scid=8&did=245#state> (naming Alabama, Arkansas, Florida, Illinois, Kentucky, Nebraska, Oklahoma, South Carolina, Tennessee, and Virginia).

<sup>197</sup> *See* CODE OF ALA. § 15-18-82(a) (2005); FLA. STAT. § 922.105 (2005); KY. REV. STAT. ANN. § 431.220 (2005); S.C. CODE ANN. § 24-3-530 (2005); TENN. CODE ANN. § 40-23-114 (2005); VA. CODE ANN. § 53.1-234 (2005). *See also* TENN. CODE ANN. § 1-3-101, n. 9 (specifically exempting the change from electrocution to lethal injection from a non-retroactivity provision).

<sup>198</sup> Electrocution exists as a statutory substitute upon the invalidation of lethal injection in Arkansas, Illinois, and Oklahoma. *See* A.C.A. § 5-4-617(b) (2005); 725 ILCS 5/119-5 (2005); 22 OKL. ST. § 1014(B) (2005).

<sup>199</sup> *See* Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us*, 63 OHIO ST. L.J. 63, 82 (2002) (claiming that in 1949, twenty-six states used electrocution as their default method of execution, but in 1973, twenty states used electrocution).

<sup>200</sup> *See* BRANDON, *supra* note 34, at 246.

<sup>201</sup> 543 U.S. 551 (2005).

states maintained both the death penalty and juvenile executions.<sup>202</sup> Because the “direction of change” was the same as in *Atkins*, this logic could strike down any number of practices: hanging, firing squads, and electrocution, all of which transcend the pale of *Trop*’s comparatively modest charge. Through statements like, “Petitioner cannot show national consensus in favor of capital punishment for juveniles but still resists the conclusion that any consensus exists against it[,]”<sup>203</sup> the Court has effectively shifted the burden to the states not only to establish that the practice does not entail excessive pain or suffering for the convicted offender<sup>204</sup> but also to prove a negative, namely, that there exists no growing consensus against such a punishment.

In addition to the evolving standards cases addressing the death penalty, the Supreme Court has also introduced uncertainty to method-of-execution questions in recent years, particularly in *Nelson v. Campbell*.<sup>205</sup> In *Nelson*, the Court held that the petitioner, a longtime intravenous drug user facing lethal injection in Alabama, could challenge—under 42 U.S.C. § 1983—a “cut-down” procedure which the state alleged was necessary to reach his compromised veins.<sup>206</sup> The unanimous decision raises several problematic observations. First, if a procedure necessary to execute one man is cruel and unusual, what recourse is there for a death row inmate who, despite his other offenses, has bound himself to the laws regulating controlled substances? Secondly, while the Court explicitly limits its holding to minimize the possibility of method-of-execution claims,<sup>207</sup> if a minor incision made under local anesthesia might constitute a viable claim of cruel and unusual punishment, does this show a trend towards new evolving standards of decency? When the Court determined whether the lower courts’ dismissal of Nelson’s § 1983 action as a successive habeas petition was appropriate, it could easily have found the dismissal constituted a harmless error, either because the petitioner waived his right to select an alternative method of execution<sup>208</sup> or because the facts could not support the Eighth Amendment claim. The Court confined itself to the case at hand and remanded it to the Fifth Circuit for further proceedings, perhaps following the surprising adherence to judicial conservatism seen in several significant 2004 cases.<sup>209</sup>

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<sup>202</sup> See *id.* at 564–65.

<sup>203</sup> *Id.* at 567.

<sup>204</sup> See *Coker v. Georgia*, 433 U.S. 584 (1977).

<sup>205</sup> 541 U.S. 637 (2004).

<sup>206</sup> See *id.* at 641.

<sup>207</sup> See *id.* at 644.

<sup>208</sup> Cf. *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001); *Greer v. Mitchell*, 264 F.3d 663 (6th Cir. 2000); *Scott v. Mitchell*, 209 F.3d 854 (6th Cir. 2000) (each holding that challenges to electrocution were irrelevant or barred since petitioners could have chosen lethal injection).

<sup>209</sup> See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (dismissing Pledge of Allegiance case on standing grounds); *Blakely v. Washington*, 542 U.S. 296, 304 (2004) (hold-

Thus, what is most noteworthy in *Nelson* is what the Court does not say, because it makes no use of Nelson's election by default to face lethal injection rather than electrocution.<sup>210</sup> Although the circumstances of the Sixth Circuit cases<sup>211</sup> are slightly different, the decisions of both the state of Alabama and the Supreme Court not to use this as a bar to petitioner's claim indicate either a more searching analysis of Eighth Amendment questions or a belief that a death row inmate cannot be expected to elect electrocution.

Both *Atkins* and *Roper* involved comparably popular classes of punishment relative to electrocution.<sup>212</sup> Legislative support for electrocution has waned to the point that only death penalty abolitionists have kept it in place in the only state where it is still the mandated method of execution.<sup>213</sup> Over twenty-six years, even Nebraska's legislators have undertaken significant action towards eliminating execution by electrocution. Numerous bills have been introduced<sup>214</sup> and the legislature has passed a moratorium on executions.<sup>215</sup> In 1979, at the urging of Senator Ernie Chambers, the unicameral legislature voted to eliminate the death penalty, but then-Governor Charles Thone vetoed the bill.<sup>216</sup> In 1998, Chambers also led the fight to pass a moratorium on executions while the legislature studied the death penalty, but then-Governor Mike Johanns vetoed the measure.<sup>217</sup>

### C. FACTUAL CONCERNS

In addition to international factors and governmental action, the electric chair faces questions of cruelty in large part because of the uncertainty surrounding the method of execution and the assumptions upon

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ing that Washington's mandatory sentencing guidelines were unconstitutional, despite their near-verbatim similarity to the Federal Sentencing Guidelines, while contending that the decision did not affect the Federal Sentencing Guidelines).

<sup>210</sup> The Court mentions that Nelson waived his right to elect electrocution, but makes no further use of his choice. *See id.*

<sup>211</sup> Discussed *supra*, Part II, §A.

<sup>212</sup> At the time of *Atkins*, 19 states permitted execution of mentally retarded offenders. *See Atkins*, 536 U.S. at 313-15. When *Roper* was decided, 20 states permitted the execution of juveniles. *See Roper*, 543 U.S. at 578-80.

<sup>213</sup> *See Death Penalty Changed in US State*, BBC.COM, available at <http://news.bbc.co.uk/1/hi/world/americas/3594223.stm>.

<sup>214</sup> The initial action was taken by Kermit Brashear in 1999, *see* LB 52, 96th Leg., 1st Spec. Sess. (Neb. 1999); Erin Dolan, *State Execution Method Draws Fire*, THE JOURNALIST, available at <http://journalism.unl.edu/joe/spring00/040500/cover.html>; *see also* Provenzano v. Moore, 744 So.2d 413, 450 (Fla. 1999).

<sup>215</sup> *See* Nebraskans Against the Death Penalty, at <http://nadp.inetnebr.com/about-nadp.htm>. (discussing 1998 moratorium).

<sup>216</sup> *See* Dolan, *supra* note 214.

<sup>217</sup> *See id.*



which it was touted as a humane punishment. This section addresses the issues of instantaneous and painless death.

The certainty of instantaneous death has been questioned since the electric chair's invention.<sup>218</sup> Given that a human being can survive being struck by a lightning bolt that potentially carries a charge of 300,000 volts,<sup>219</sup> an electric chair designed to induce "instantaneous" death seems destined to fail when operating at less than one percent of that voltage and a lower amperage.<sup>220</sup>

Indeed, the electric chair has failed to induce instantaneous death, with condemned prisoners living for as long as seventeen minutes during electrocutions.<sup>221</sup> Because doctors cannot check the body for signs of life until after the electrocuted body has time to cool off to a temperature at which a doctor can safely touch it<sup>222</sup> it is nearly certain that excess electricity will be applied to the condemned to ensure death, thus leading to charring, blistering, and melting.<sup>223</sup> Furthermore:

[e]xperience proves that human beings vary enormously in their powers of resistance to electrocution, which depends upon the strength of current and not upon voltage pressure: hence, *several shocks* may be required to produce what medical experts can reasonably define as death, which means that doctors have to stand by with stethoscopes at the ready to apply to the victim's chest when he or she has been given one or more doses of current.<sup>224</sup>

In comparison, heart monitors are employed in lethal injections<sup>225</sup> to actively determine whether a prisoner's heart has stopped. While more poison may be administered to the prisoner than is absolutely vital, the result will not be a significantly more tortured individual or mangled corpse.

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<sup>218</sup> See BRANDON, *supra* note 34, at 113.

<sup>219</sup> See NASA, *Human Voltage: What Happens When People and Lightning Converge*, [http://science.nasa.gov/newhome/headlines/essd18jun99\\_1.htm](http://science.nasa.gov/newhome/headlines/essd18jun99_1.htm).

<sup>220</sup> Compare *id.* with COMMITTEE, *supra* note 6.

<sup>221</sup> See BRANDON, *supra* note 34, at 244-257.

<sup>222</sup> See *Glass v. Louisiana*, 471 U.S. 1080, 1091 (Brennan, J., dissenting from denial of cert).

<sup>223</sup> See *id.* at 1088 (Brennan, J., dissenting from denial of cert); *Dawson v. State*, 554 S.E.2d 137, 141 (Ga. 2002)).

<sup>224</sup> CHARLES DUFF, A HANDBOOK ON HANGING 119 (1974).

<sup>225</sup> See San Quentin Institution Procedure No. 770 (procedures for carrying out an execution by lethal injection), *available in part* at <http://web.amnesty.org/library/Index/ENG-GACT500011998?open&of=ENG-TWN>.

The discovery of the truly nauseating results of electrocution are hardly new, as evidenced by the report of a Pennsylvania Supreme Court Justice who witnessed the execution of Roger Haike in 1931:

Roger's head flew back and his body leaped forward against the confining straps. Almost at once smoke arose from his head and left wrist and was sucked up into the ventilator overhead. The body churned against the bonds, the lips ceased trembling and turned red, then slowly changed to blue. Moisture appeared on the skin and a sizzling noise was audible. The smell of burning flesh grew heavy in the air.

Roger was being broiled . . .

. . . Then came the second jolt and again the body surged against the restraining straps and smoke rose from it. The visible flesh was turkey red.

Again the current slammed off and this time the doctor stepped forward to listen, but he moved back again and shook his head. Apparently Roger still clung faintly to life.

The third charge struck him, and again the smoking and sizzling and broiling. His flesh was swelling around the straps.

The doctor listened carefully and raised his head.

"I pronounce this man dead," he said, folding up his stethoscope. It was seven minutes after Roger had been seated in the chair.<sup>226</sup>

Although the Haike execution provided anecdotal evidence for the prolonged violent death many experienced in the electric chair, state protocols for executions underscore just how unlikely instantaneous death really is, with many states having procedures administering electrical shocks in up to four sets, and never for less than a 15 second period.<sup>227</sup>

The issue of painlessness has also been subject to dispute. Although electrical torture at Abu Ghraib involves lower levels of voltage than electrocution,<sup>228</sup> there is significant reason to doubt that the assumption of a painless death in the electric chair is incorrect. In other words, if one hundred volts constitutes torture, how does increasing it twentyfold

<sup>226</sup> CURTIS BOK, *STAR WORMWOOD* 183-84 (1959).

<sup>227</sup> See COMMITTEE ON CRIMINAL JUSTICE—FL., *A MONITOR: METHODS OF EXECUTION & PROTOCOLS, IV. METHODS OF EXECUTION*, available at <http://www.fcc.state.fl.us/fcc/reports/monitor/methmon.html>.

<sup>228</sup> See *id.*; Sewell Chan, *Marine Sergeant to Face Court-Martial in Abuse; Four Charged in Case of Iraqi Prisoner Receiving Electric Shocks at Makeshift Detention Facility*, WASHINGTON POST, June 12, 2004, at A18.

make it humane? The answer generally has been that the higher voltage renders the electrocuted individual unconscious,<sup>229</sup> but given the untestability of the hypothesis and the extraordinary individual resistance to electricity witnessed in electrocutions,<sup>230</sup> the conclusion is at least questionable.

Judges who have sworn to uphold the Constitution, and thus, the Eighth Amendment, can no longer assume that death in the electric chair is instantaneous.<sup>231</sup> Deaths have taken up to seventeen minutes and many states even employed procedures using multiple jolts of electricity from the outset, indicating that instantaneous death, if not unconsciousness, is a myth.<sup>232</sup> The factual assumptions accepted by courts prior to Kemmler's execution ought to have no precedential value because they were merely assumptions—at that time, no judicially-imposed electrocution had ever taken place. Now, with the hindsight of thousands of electrocutions, some facts are now clear, including the disastrous consequences that courts have failed to explain, such as those in the Tafero execution. Furthermore, all indications are that condemned people will inevitably face the more mundane, yet no less nauseating consequences noted by witnesses and referred to in Justice Brennan's dissent from denial of certiorari in *Glass v. Louisiana*.<sup>233</sup>

#### D. WHAT HURDLES REMAIN FOR A TROP-BASED CHALLENGE?

Two hurdles make a Supreme Court challenge to electrocution on the basis of "evolving standards of decency" uncertain. The first is the novelty of applying *Trop v. Dulles* in the method-of-execution context. Although the circuits are in consensus that *Trop* applies to the methods by which a sentence is implemented<sup>234</sup> rather than the sentence itself, the Supreme Court has not engaged in method-of-execution analysis since *Trop* was decided in 1958. A rigorous method-of-execution analysis regime would appeal to death penalty opponents, because it could represent the opportunity to narrow the range of permissible execution methods. Moreover, a move to method-of-execution analysis would also return the Court to an approach more likely in line with the original intent of the Eighth Amendment.<sup>235</sup> Although at least one state court has

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<sup>229</sup> See BRANDON, *supra* note 34, at 113.

<sup>230</sup> See *id.* at 251–52.

<sup>231</sup> See, e.g., *Dawson v. State*, 554 S.E.2d 137, 141 (citing expert testimony that electrocution might not even produce instant unconsciousness, let alone death); BRANDON, *supra* note 34, at 244–257 (detailing botched or lengthy electrocutions).

<sup>232</sup> See BRANDON, *supra* note 34 at 251–52.

<sup>233</sup> See *Glass v. Louisiana*, 471 U.S. 1080, 1087–1094 (Brennan, J., dissenting) (discussing complications and consequences of executions in the electric chair).

<sup>234</sup> See *supra* Part II, §A.

<sup>235</sup> See *Gardner v. Florida*, 430 U.S. 349, 371 (1977) (Rehnquist, J., dissenting); *Wilkinson v. Utah*, 99 U.S. 130, 135 (1879) ("Cruel and unusual punishments are forbidden by the

assumed that *Trop* caused the complete abandonment of method-of-execution analysis,<sup>236</sup> the Supreme Court has in fact only noted that Eighth Amendment analysis is not *confined* to such assessments of whether a method of execution is “barbarous.”<sup>237</sup> Furthermore, although Justice Scalia has urged that the interpretation of the Eighth Amendment should rely wholly upon original intent,<sup>238</sup> this is emphatically not the law of the United States unless and until *Trop*’s standard is overruled.

If the standards of *Trop* applied, even under the AEDPA regime codified at 28 U.S.C. § 2254(d), litigants might be able to satisfy one of the standards, showing that the lower court decision permitting the electric chair is contrary to Supreme Court precedent or that it was an unreasonable application of the facts in the case. A petitioner could argue that a court’s decision to uphold the electric chair is an unreasonable application of facts in light of *Kemmler* and *Wilkerson v. Utah*,<sup>239</sup> given that death is not instantaneous in many, if not all, electrocutions. The petitioner could also argue that following *Coker v. Georgia* and *Enmund v. Florida*, electrocution serves no legitimate penological interest due to the availability of more humane and less mutilating forms of execution. Admittedly this is a narrow and risky argument; risky because *Coker* and *Enmund* spoke of the punishment of death without regard for the method of execution, but it is potentially persuasive when considered in combination with the nearly complete desertion of electrocution as a method of execution.

Lastly, as a risky fallback option, a petitioner could always argue for the support found in *Atkins* and *Roper* in legislative change and international standards. Because *Atkins* involved a direct appeal, the Court did not have to apply the rigorous standard of 28 U.S.C. §2254(d)(1) which applies only to habeas corpus petitions. 2254(d)(1) requires a habeas petitioner to establish that the lower courts rejected their claims in a manner “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” Similarly, *Roper* arose on an appeal from a so-called “state habeas,” thus avoiding the limitations of 2254(d)(1). Nonetheless, a petitioner with nothing else to fall back on could do worse than to argue that the Court’s holdings have established baselines of in-

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Constitution, but . . . the punishment of shooting as a mode of executing the death penalty . . . is not included in that category.”).

<sup>236</sup> See *Trimble v. State*, 487 A.2d 1143 (Md. 1984) (“[T]he *Gregg* plurality noted that the Court had abandoned the early, more narrow approach of determining only whether any given method of execution was torturous or barbarous.”)

<sup>237</sup> *Gregg v. Georgia*, 428 U.S. 153, 171 (1976).

<sup>238</sup> See *Roper v. Simmons*, 543 U.S. 551, 608 n.1 (2005) (Scalia, J., dissenting).

<sup>239</sup> 99 U.S. 130, 136 (holding that punishments of torture are forbidden by the Constitution).

stantaneity and painlessness that one could not reasonably believe are present in electrocutions.

Many state and circuit courts have been ready and willing to shield themselves from method-of-execution issues by relying on precedent that disposes of a petitioner's claim for reasons other than the merits<sup>240</sup> or precedent that—while ostensibly on the merits—is factually unfounded.<sup>241</sup> It is uncertain how long courts can continue to avoid this issue through procedural bars and refusing to grant evidentiary hearings. Compounding these deeply rooted flaws is the seeming ambivalence of the courts toward the original intent behind the switch to electrocution—a desire to replace hanging with a more “humane” extinguishment of life.<sup>242</sup> If considering the shift to electrocution from a teleological standpoint, it seems nearly certain that electrocution is no longer viable. Even if an offender's death is painless and his loss of consciousness instantaneous, the mere connection of electrocution with the brutal regimes of Iraq and Turkey and with the disgusting saga of Abu Ghraib casts a pall on this method of execution. Nebraska's electric chair is a paradigmatic case that demands the evolving standards of decency of *Trop* finally sever the connection to these torturous regimes and put an end to the strained use of *Kemmler* as blanket authority for all that can be hidden under an impenetrable cloak of painlessness.

Nonetheless, a second concern remains because a judge who extends *Trop* to bar electrocutions would likely face significant political attack. Given the response by some politicians, including Senator John Cornyn (R-TX) and Representative Tom DeLay (R-TX),<sup>243</sup> who have publicly chastised the *Roper* Court for its judicial activism, it is questionable whether five justices would gladly take more such rebukes for effectively commuting the sentences of the ten men on Nebraska's death row. Nonetheless, because current method-of-execution precedent is largely ambiguous and thus poses a potential to endanger the validity of sentences implicating other, more popular methods of execution, the likely backlash would be mitigated somewhat.

Passage of Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and particularly § 2254(d)(1) may have restricted habeas challenges dramatically.<sup>244</sup> Case law favoring a broader interpretation of

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<sup>240</sup> See, e.g., *Williams v. Hopkins*, 130 F.3d 333 (8th Cir 1997); *Lindsey v. Smith*, 820 F.2d 1137 (11th Cir. 1987).

<sup>241</sup> See, e.g., *In re Kemmler*, 136 U.S. 436 (1890).

<sup>242</sup> See *id.* at 243.

<sup>243</sup> See Babington, *supra* note 20.

<sup>244</sup> See Bryan Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 702 (2002). But see John H. Blume, *AEDPA: The “Hype” and the “Bite”*, 91 CORNELL L. REV. 259, 297 (2006) (“[B]y the time AEDPA's habeas ‘reform’ measures were enacted, there was very little habeas left.”).

*Trop*, however, has operated in the opposite direction to expand successful habeas petitions beyond the nature of punishment and questions of innocence. It has finally become more than a remote possibility for a habeas petitioner to argue that, regardless of the existence of pain during electrocutions—itself a heavily-debated question—evolving standards of decency might bar the electric chair.

### CONCLUSION

The case has never been stronger for the abolition of the electric chair with the factual assumptions of *Kemmler* now undermined by over a century of experience with the electric chair, especially when analyzed under the “mere extinguishment of life” standard apparently adopted in *Kemmler* merged with the two standards of *Trop*. When compared to its intent, the charring, potentially torturous death, the fears it inspires,<sup>245</sup> and the association with agonizing vengeance which it has been given by some,<sup>246</sup> the electric chair cannot pass a test of constitutional rigor. It has been readily abandoned and has fallen from the predominant form of execution in the United States to a few scattered relics. Its use has become truly unusual.

Furthermore, after *Roper* and *Atkins*, the standards for determining whether a punishment falls outside the realm of decency are more flexible than ever. Even without the swing vote of Justice O'Connor that added the sixth vote in *Atkins*, it is plausible that Justice Kennedy might, as in *Roper*, join with Justices Souter, Stevens, Ginsburg, and Breyer to eliminate the last bastion of electrocution.

Unlike the Supreme Courts of Georgia and Florida, Nebraska's Supreme Court has shown no willingness to cede even the possibility that electrocution might constitute cruel and unusual punishment under the state constitution.<sup>247</sup> Because any challenge to Nebraska's use of electrocution would in effect challenge the validity of the condemned man's death sentence, it is unlikely that *Nelson v. Campbell* would permit a §1983 suit to be brought against the electric chair.<sup>248</sup> The state execution

<sup>245</sup> See *Smith v. Bowersox*, 311 F.3d 915, 922 (8th Cir. 2002); *Conner v. State*, 982 S.W.2d 655 (Ark. 1998) (noting that police used the threat of the electric chair to “persuade” individuals into confessing).

<sup>246</sup> See BRANDON, *supra* note 34, at 2 (quoting former Florida Attorney General Bob Butterworth, “People who wish to commit murder, they better not do it in the state of Florida because we have a problem with our electric chair.”).

<sup>247</sup> See discussion *supra*, Part II, §C.

<sup>248</sup> Compare *Nelson v. Campbell*, 541 U.S. 637, 644 (“We need not reach here the difficult question of how to categorize method-of-execution claims generally.”) with *Spivey v. State Bd. of Pardons and Paroles*, 279 F.3d 1301, 1302 (11th Cir. 2002) and *Williams v. Hopkins*, 130 F.3d 333, 336 (8th Cir. 1997) and *In re Sapp*, 118 F.3d 460, 461 (finding that § 1983 actions challenging circumstances or method of execution constituted successive habeas petition).

protocol might still be challenged on the ground that fifteen seconds<sup>249</sup> is not “instantaneous” as the *Kemmler* case had presupposed, but, given that executions have not been instantaneous in the last 115 years, such a challenge would likely fail. Following *Nelson*, it is probable that this suit could only be made in a habeas petition; any failure to make the claim in a habeas petition would likely bar it later.<sup>250</sup> Thus, habeas is the only likely route to relief for inmates who have exhausted their appeals.

The path to a writ of habeas corpus, however, is hardly less tumultuous.<sup>251</sup> The Antiterrorism and Effective Death Penalty Act (AEDPA) provides a new challenge for habeas petitioners, nearly foreclosing review of method-of-execution cases by erecting a virtually complete bar to “evolving standards of decency,” unless those standards are, in fact, already federal law.<sup>252</sup> Conveniently, however, federal law has maintained certain baselines while simply ignoring facts or assuming them as an essential part of maintaining the electrocution regime. The precedent supporting the electric chair over the last 115 years could even, with some hyperbole, be characterized as “indisputably meritless.”<sup>253</sup>

Furthermore, if considering the “dignity of man” approach offered in *Trop*, there are additional reasons to perceive electrocution as a cruel punishment. The fiery electrocutions of Jesse Tafero and Pedro Medina and the bloody death of Allen Lee “Tiny” Davis are all proof of truly dehumanizing punishment. Compounding these with the “death mask,”<sup>254</sup> the loss of organ function leading to defecation<sup>255</sup> or ejaculation<sup>256</sup> during the electrocution, and the uncertainty of immediate death, there is significant evidence that the electric chair represents a punishment far more undignified than is necessary for the “mere extinguishment of life.”

The time to eliminate the electric chair has long passed, yet courts have deferred and deferred despite the lack of any substantive precedent on the issue until the state legislatures rendered the issue moot. While, the Eighth Amendment enters what may be its most critical juncture, as

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<sup>249</sup> See *Death Penalty Changed in US State*, BBC.COM, available at <http://news.bbc.co.uk/1/hi/world/americas/3594223.stm>. (noting Nebraska’s change to a one-jolt, fifteen-second application of electricity in its execution protocol).

<sup>250</sup> See *Coleman v. Thompson*, 501 U.S. 722 (1991) (“The [adequate state ground] doctrine applies to bar federal habeas when a state court declined to address a prisoner’s federal claims because the prisoner had failed to meet a state procedural requirement.”).

<sup>251</sup> See *Stevenson*, *supra* note 244, at 702–03 (discussing ways AEDPA “dramatically altered” federal habeas corpus practice to the detriment of habeas petitioners).

<sup>252</sup> See 28 U.S.C. § 2254(d) (2000).

<sup>253</sup> The phrase is used in *Williams v. Hopkins*, 983 F.Supp 891, 894 (D. Neb 1997) (describing the claim that electrocution is cruel and unusual as frivolous and based upon an “indisputably meritless” theory).

<sup>254</sup> *Glass v. Louisiana*, 471 U.S. 1080, 1087 n. 13.

<sup>255</sup> See *id.* at 1087 (Brennan, J., dissenting).

<sup>256</sup> See BRANDON, *supra* note 34, at 179.

rumors of innocent people being executed<sup>257</sup> and uncertainty about capital convictions arise,<sup>258</sup> it is vital that the Eighth Amendment not become a mere truism that in forms of execution, no matter how apparently brutal, "all is retained which has not been surrendered."<sup>259</sup> Although there may indeed be a humane form of execution, the evidence is more than sufficient to show that it is not electrocution. For the sake of our constitutional principles, the courts must not gamble on a probability that Horace Dunkins<sup>260</sup> or William Vandiver<sup>261</sup> were rendered unconscious prior to being electrocuted.

Prisoners on Nebraska's death row have no choice, because Nebraska law expressly prohibits their execution by any form but electrocution.<sup>262</sup> In contrast, the proponents of capital punishment have an option, not to merely support lethal injection as a preferred method of execution, but to ensure that the electric chair is eliminated so that states may gain a substantial meaning of what the Eighth Amendment does and does not permit in the execution of the ultimate punishment. Although some case law exists that has addressed lethal injection's viability as a method of execution under the Eighth Amendment, it is nearly as fragile as the *Kemmler* decision and its offspring.<sup>263</sup> While the public may have mixed feelings about the death penalty,<sup>264</sup> at least the most public proponents of electrocution—those who surround prisons at the time of executions<sup>265</sup>—seem to be in total agreement with defense experts' assessments<sup>266</sup> that the electric chair is an extremely painful form of death.

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<sup>257</sup> See, e.g., *Editorial: Clemency and Justice*, BALTIMORE SUN, Nov. 30, 2005, at 12A.

<sup>258</sup> Christina Bellantoni and Keyonna Summers, *Warner Commutes Death Sentence; Destruction of DNA Evidence Cited*, THE WASH. TIMES, Nov. 30, 2005, at B01; Frank Green, *DNA Test Talks Proceed in Coleman Case; the Exam Could Prove an Executed Inmate's Guilt or Innocence*, RICHMOND (VA.) TIMES-DISPATCH, Nov. 23, 2005, at B-4.

<sup>259</sup> *United States v. Darby*, 312 U.S. 100, 124 (1941) (referring to the Tenth Amendment).

<sup>260</sup> It took the State of Alabama two jolts of electricity, nine minutes apart, to kill Dunkins in the electric chair. See BRANDON, *supra* note 34, at 252.

<sup>261</sup> Vandiver's execution by the State of Indiana required five jolts of electricity and took a total of seventeen minutes. See *id.* at 251.

<sup>262</sup> See NEB. REV. STAT. § 29-2532 (2004).

<sup>263</sup> See, e.g., *Woolls v. McCotter*, 798 F.2d 695 (5th Cir. 1995); *Hunt v. Nuth*, 57 F.3d 1227 (4th Cir. 1995) (barring challenge on procedural grounds).

<sup>264</sup> A recent Gallup poll has shown that 64 percent of people support the death penalty as an available punishment for murders, down from 80 percent in 1994. See *America to Execute 1,000th Prisoner*, BIRMINGHAM (U.K.) POST, Nov. 30, 2005, at 8.

<sup>265</sup> See BRANDON, *supra* note 34, at 252 (describing the chants and signs of those gathered around Florida's death row at the time of Ted Bundy's execution).

<sup>266</sup> See, e.g., John Allen, *Wisconsin Week, Emeritus Engineering Professor Pulls Plug on Electric Chair's Reliability*, available at <http://www.news.wisc.edu/6648.html>; Donald D. Price, *Pain in the Electric Chair*, available at <http://www.ampainsoc.org/pub/bulletin/sep02/polil.htm>.



Furthermore, while Supreme Court rules are not necessarily retroactive,<sup>267</sup> it is an unlikely strain to pull methods of execution into the “procedural” category of *Duncan v. Louisiana*.<sup>268</sup> In addition, the Supreme Court has held that a ruling that places a punishment off-limits for certain offenders or changes the state’s ability to bar certain primary conduct would be wholly retroactive for petitioners on collateral review.<sup>269</sup> This conclusion combined with the complete retroactivity witnessed in *Furman v. Georgia*<sup>270</sup> indicate a significant likelihood that barring a certain method of execution would necessarily be retroactive. Thus, a ruling that lethal injection constitutes cruel and unusual punishment would likely result in the commutation of hundreds, or even thousands, of death sentences in the United States,<sup>271</sup> excepting only those states that preserve alternate methods of execution.<sup>272</sup> On the other hand, prohibiting electrocution would result in the commutation of only ten death sentences.<sup>273</sup>

The electric chair has become infamous for its disastrous malfunctions. Its most significant malfunction, however, is more horrific than the executions of Jesse Tafero or Horace Dunkins—it is the malfunction of a judicial system designed to vigorously protect the rights of the politically powerless and even the profoundly guilty. The value of generally applicable constitutional rights ought not be determined by something so variable as the electrical resistance of a condemned individual.<sup>274</sup>

It may only have taken forty seconds for Jose Sandoval, Jorge Galindo, and Erick Vela to kill five people. The electric chair, if working properly, might not even take that long to kill any one of them. But for the Eighth Amendment to mean what it says, it must command that any punishment generating grossly excessive violence and carrying unresolved concerns as a punishment is constitutionally impermissible and recognize that its horror does not serve its purported purpose.<sup>275</sup> The

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<sup>267</sup> See *Teague v. Lane*, 489 U.S. 288 (1989).

<sup>268</sup> 391 U.S. 145 (1968).

<sup>269</sup> *Penry v. Lynaugh*, 492 U.S. at 330.

<sup>270</sup> 408 U.S. 238 (1972).

<sup>271</sup> *Executions, Death Sentences Down in 2004*, CHI. TRIBUNE, November 14, 2005, at 6 (noting that 3,315 people were on death rows around the United States in 2004).

<sup>272</sup> See *supra* note 197.

<sup>273</sup> DEATH PENALTY INFORMATION CENTER, STATE BY STATE INFORMATION: NEBRASKA, <http://www.deathpenaltyinfo.org/state/>. In comparison, 649 people are currently on death row in California. See Aimee Green, *Staying Alive on Death Row*, PORTLAND OREGONIAN, Mar. 5, 2006, at B1.

<sup>274</sup> Cf. *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968) (“Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations or by the thickness of the prisoner’s clothing.”).

<sup>275</sup> See *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (“The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life hu-

Supreme Court has recognized one overriding principle as far back as *In re Kemmler* and *Wilkerson v. Utah*<sup>276</sup>—the death penalty, even if constitutionally permissible, must not be a celebration of horrific violence and revenge. It is supposed to be the “mere extinguishment of life[;]”<sup>277</sup> it is not, and must not be, a circus.<sup>278</sup>

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manely.”); *Malloy v. South Carolina*, 237 U.S. 180, 183 (1915) (“The constitutional inhibition of ex post facto laws was . . . not [intended] to obstruct mere alteration in conditions deemed necessary for the orderly infliction of humane punishment.”).

<sup>276</sup> 99 U.S. 130 (1879).

<sup>277</sup> *In re Kemmler*, 136 U.S. 436, 447 (1890).

<sup>278</sup> *Jones v. Butterworth*, 701 So.2d 76, 87 (Fla. 1997) (Shaw, J., dissenting).

